

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

In the matter of

Carriage of the Transmissions of  
Digital Broadcast Stations

CS Docket No. 98-120

RECEIVED  
DEC 22 1998  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

REPLY COMMENTS OF  
THE ASSOCIATION OF LOCAL TELEVISION STATIONS, INC.



Association of Local Television Stations, Inc.  
1320 19th Street, N.W.  
Suite 300  
Washington, D.C. 20036  
(202) 887-1970

December 22, 1998

No. of Copies rec'd  
List A B C D E

0+8

## SUMMARY

ALTV places emphasis on two points in these reply comments. First, comments filed by cable television MSOs and networks roundly confirm that the cable industry wishes to do nothing it is not otherwise inclined to do to facilitate the transition from analog to digital television. Cable interests uniformly have opposed DTV must carry rules in bold and uncompromising terms. They proffer more lame excuses for opposing DTV must carry than Disney has dalmatians:

- They litter the record with a flurry of legal arguments which range from specious to fanciful to ludicrous.
- They chant incessantly a constitutional mantra that is out of tune with the Court's decision rejecting their constitutional objections to the analog must carry rules.
- They dispute the obvious unity of government interests served by both digital and analog must carry rules.
- They myopically discount the government interest in an expeditious transition from analog to digital television.
- They proffer another litany of overblown claims of no channel capacity, assuming, perhaps, that no one has noticed the cable industry's widespread construction of digital facilities.
- They posit a double must carry burden, but make no mention that twice *de minimis* is still *de minimis*.
- They exalt the diversity of cable networks, ignoring that they are neither free, universally available, nor as popular as even the more marginal local television stations.
- They boast of their service to the public, while the most visible manifestation of their service, C-SPAN, frets that cable operators will stampede to drop its network(s) if the Commission requires carriage of local DTV signals.
- They would leave consumers to buy and install new off-air antennas to replace the antennas graciously removed from their roof tops and set tops by local cable operators over the past several decades.
- They readily acknowledge their own economic incentives to engage in just the sort of selective carriage of local television stations which prompted adoption and judicial approval of the analog must carry rules.

ALTV in these reply comments delineates and disposes of 34 of such excuses. Thus, in the face of costly cooperative efforts involving the broadcast industry, the consumer electronics industry, the broadcast equipment industry, the Commission, and even the cable industry (when it was convenient), the cable industry now displays no interest in cooperating or playing a role the

Commission considers essential to the true and ultimate success of free, broadcast television as a completely digital medium.

ALTV also emphasizes that nothing yet submitted to the Commission in this proceeding even begins to obscure the eminently predictable result of failing to adopt DTV must carry rules: A significant number of local television stations' DTV signals will not be carried by cable systems in their local markets. Cable systems will carry the signals of local television stations affiliated with the major networks, using them as a draw for their own digital program services. Other stations, including many of ALTV's member stations, which have remained independent or have affiliated with emerging networks, will be denied access to as much as two-thirds of their potential audiences. The comments of major cable MSOs and networks leave no real doubt about their position. One need read very little between the lines to understand what cable interests mean: leave us unencumbered to carry those stations which will help us attract subscribers -- and dump the rest. From ALTV's perspective, this is the heart of the matter. Some, perhaps, many, stations will be carried in the absence of DTV must carry rules during the transition, but a significant number will be denied carriage by many local cable systems. This will have a devastating impact not only on the stations and the non-cable subscribers in their markets, but also on the successful completion of a full transition to digital television. Thus, marginated stations will remain on the margin or fail altogether; marginated consumers will yet suffer inferior DTV service (*vis-a-vis* their cable subscriber neighbors) from a "rump broadcasting industry." ALTV, therefore, reiterates its call for immediate adoption of DTV must carry rules, applicable during the transition and beyond.

## TABLE OF CONTENTS

<b>PART ONE: THE LITANY OF LAME EXCUSES</b> . . . . .	<b>7</b>
<b>Excuse Number One:</b> Section 614 Does Not Require DTV Must Carry Rules During the Transition Because Only Signals “Which Have Been Changed” Are Subject to Must Carry. . . . .	<b>7</b>
<b>Excuse Number Two:</b> Section 614(b)(5), Which Permits Cable Operators to Refuse Carriage of Stations with Programming Which Substantially Duplicates or Affiliated with the Same Network as Another Station Carried on the System, Defeats the Requirement That a Local Television Station’s Analog and Digital Signals Be Carried. . . . .	<b>13</b>
<b>Excuse Number Three:</b> Section 614(b)(3)(A), Which Requires Carriage of the Primary Video of Local Television Stations, Negates the Requirement That Cable Systems Carry Both the Analog and DTV Signals of Local Commercial Television Stations. . . . .	<b>14</b>
<b>Excuse Number Four:</b> Section 614(B)(7), Which Requires That Signals Be Provided to Every Subscriber and Viewable on All Their Receivers, Bars Imposition of DTV Must Carry Requirements. . . . .	<b>15</b>
<b>Excuse Number Five:</b> The One-Third Cap on Channel Capacity Devoted to the Signals of Local Television Stations in Section 614(B)(1)(B) Undermines Operation of DTV Must Carry During the Transition. . . . .	<b>18</b>
<b>Excuse Number Six:</b> The Lack of Congressional Findings Relating to DTV Must Carry Indicates That Congress Never Intended that the Commission Adopt DTV Must Carry Rules. . . . .	<b>20</b>
<b>Excuse Number Seven:</b> Section 309(j) of the 1997 Balanced Budget Act Invalidates the Conclusion that Section 614 Requires Carriage of Local Television Stations’ DTV as Well as Analog Signals. . . . .	<b>23</b>
<b>Excuse Number Eight:</b> The Legislative History of the 1992 Cable Act Indicates That Congress Never Intended DTV Must Carry Rules to Apply During the Transition. . . . .	<b>26</b>
<b>Excuse Number Nine:</b> The Legislative History of the 1996 Telecommunications Act Confirms Congressional Intent that the 1992 Cable Act Provided No Must Carry Requirement for DTV During the Transition. . . . .	<b>27</b>
<b>Excuse Number 10:</b> The Legislative History of the 1997 Balanced Budget Act Confirms Congressional Intent that the 1992 Cable Act Provided No Must Carry Requirement for DTV During the Transition. . . . .	<b>28</b>
<b>Excuse Number 11:</b> The Telecommunications Act of 1996 Provides the Commission with No Authority to Adopt DTV Requirements During the Transition. . . . .	<b>29</b>
<b>Excuse Number 12:</b> Section 614 May Not Be Construed to Require DTV Must Carry Requirements During the Transition Because, Thus Construed, It Would Be Unconstitutional. . . . .	<b>30</b>
<b>Excuse Number 13:</b> Section 624(f) of the Communications Act Bars Any DTV Must Carry Requirement Other Than Those Mandated in Title VI. . . . .	<b>31</b>
<b>Excuse Number 14:</b> DTV Must Carry During the Transition Would Be Unconstitutional Because No Substantial Government Interest Has Been Articulated in Support of Such Rules. . . . .	<b>32</b>

<b>Excuse Number 15:</b> DTV Must Carry During the Transition Would Be Unconstitutional Because the Substantial Government Interests Justifying Analog Must Carry Fail to Justify -- and, Indeed, May Be Compromised by -- DTV Must Carry During the Transition. . . . .	<b>33</b>
<b>Excuse Number 16:</b> DTV Must Carry During the Transition Would Be Unconstitutional Because the Substantial Government Interest in Preserving the Existing Structure of Broadcast Television Has Eroded. . . . .	<b>40</b>
<b>Excuse Number 17:</b> DTV Must Carry During the Transition Would Be Unconstitutional Because the Substantial Government Interest in Preserving a Diversity of Programming from Multiple Sources Would Be Disserved by DTV Must Carry Rules During the Transition. . . . .	<b>42</b>
<b>Excuse Number 18:</b> DTV Must Carry During the Transition Would Be Unconstitutional Because Promoting an Expeditious Transition to DTV Is Not a Substantial Government Interest. . . . .	<b>44</b>
<b>Excuse Number 19:</b> DTV Must Carry During the Transition Would Be Unconstitutional Because No Record or Evidence Exists to Demonstrate the Need for DTV Must Carry Rules During the Transition. . . . .	<b>46</b>
<b>Excuse Number 20:</b> DTV Must Carry During the Transition Will Be Unnecessary Because Local Television Stations' DTV Signals Will Be Carried Voluntarily. . . . .	<b>48</b>
<b>Excuse Number 21:</b> DTV Must Carry Rules During the Transition Would Be Unconstitutional Because They Would Double the Number of Signals Cable Systems Would Be Required to Carry, Thereby Imposing an Undue Burden on Cable Operator's Editorial Prerogatives. . . . .	<b>50</b>
<b>Excuse Number 22:</b> Cable System Upgrades Provide No Basis for Burdening Cable Systems with the DTV Signals of Local Television Stations. . . . .	<b>57</b>
<b>Excuse Number 23:</b> DTV Must Carry Rules During the Transition Would Disserve the Public Interest Because Some Really Good Programming on Cable Networks Would Be Supplanted by the DTV Signals of Local Television Stations. . . . .	<b>58</b>
<b>Excuse Number 24:</b> DTV Must Carry Rules During the Transition Would Disserve the Public Interest Because Consumers Always Can Use A-B Switches to Gain Access to the DTV Signals of Local Television Stations. . . . .	<b>60</b>
<b>Excuse Number 25:</b> DTV Must Carry Rules During the Transition Would Disserve the Public Interest Because Consumers Will See Blank Screens on Analog Sets When Tuned to a Channel Carrying a DTV Signal. . . . .	<b>61</b>
<b>Excuse Number 26:</b> DTV Must Carry Rules During the Transition Would Fail to Serve the Public Interest Because Local Television Stations' DTV Signals Will Provide Duplicate Programming. . . . .	<b>62</b>
<b>Excuse Number 27:</b> DTV Must Carry Rules During the Transition Would Fail to Serve the Public Interest Because Only a Few Rich Viewers Will Have Sets Capable of Receiving Local Television Stations' DTV Signals. . . . .	<b>63</b>
<b>Excuse Number 28:</b> DTV Must Carry Rules During the Transition Would Fail to Serve the Public Interest Because Local Television Stations' DTV Signals Will Provide Nothing Not Already Available on Cable Systems. . . . .	<b>64</b>

<b>Excuse Number 29:</b> DTV Must Carry Rules During the Transition Would Fail to Serve the Public Interest Because Consumers Will Be Unable to View Local Television Stations' DTV Signals on Their Analog Receivers. . . . .	<b>65</b>
<b>Excuse Number 30:</b> DTV Must Carry Rules During the Transition Would Fail to Serve the Public Interest Because Local Television Stations' DTV Signals Are Subject to No Specific Public Interest Obligations. . . . .	<b>65</b>
<b>Excuse Number 31:</b> DTV Must Carry Rules During the Transition Would Be Unconstitutional Because They Constitute a Taking of Property Without Due Process of Law. . . . .	<b>67</b>
<b>Excuse Number 32:</b> DTV Must Carry Rules During the Transition At Least Should Not Apply to Home Shopping/Infomercial Stations Because They Provide Only an Ancillary DTV Service and Carry Little or No Locally Originated Programming. . . . .	<b>69</b>
<b>Excuse Number 33:</b> DTV Must Carry Rules During the Transition Would Thwart Consumer Choice and Disrupt a Working Marketplace. . . . .	<b>70</b>
<b>Excuse Number 34:</b> DTV Must Carry Rules During the Transition Are Unnecessary Because They Will Not Assure That Broadcast DTV Is Successful. . . . .	<b>71</b>
 <b>PART TWO: A FEW OTHER MATTERS WORTHY OF NOTE . . . . .</b>	 <b>72</b>
• <b>DTV Must Carry Rules Should Become Effective Immediately . . . . .</b>	<b>72</b>
• <b>A Cable System is a Cable System is a Cable System . . . . .</b>	<b>72</b>
• <b>No Bar Should Be Placed on Exclusive DTV Signal Carriage Agreements. . . . .</b>	<b>73</b>
 <b>CONCLUSION . . . . .</b>	 <b>75</b>

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.**

In the matter of

Carriage of the Transmissions of  
Digital Broadcast Stations

**CS Docket No. 98-120**

**RECEIVED**

**DEC 22 1998**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**REPLY COMMENTS OF  
THE ASSOCIATION OF LOCAL TELEVISION STATIONS, INC.**

Cable television interests have more lame excuses for opposing DTV must carry than Disney has dalmatians.<sup>1</sup> Only by weeding out the redundant, repetitious, and ridiculous may ALTV limit its reply to 33 (oops! 34) such excuses, thereby (almost) remaining within the one-

---

<sup>1</sup>Speaking of which, where is Disney? Conspicuously absent from the record in this proceeding are comments from any of the so-called major networks (including Disney's ABC) supporting DTV must carry. Only NBC has filed, but in so doing studiously and expressly avoided taking a position on DTV must carry *per se*. Why? One may surmise only that the networks are confident that cable systems will carry their network programming, presumably via carriage of the DTV signals of their local owned and operated stations and affiliates. One also would note that each of the networks is affiliated with cable networks which depend on cable carriage for distribution. ALTV respectfully submits that the networks' abstention from the DTV must carry debate casts a harsh light on the danger to ALTV's member stations. As reiterated herein, ALTV predicts that history will repeat itself. As was the case with analog signals, many cable systems will deny carriage to the DTV signals of independent stations serving more niche-like audiences and local television stations affiliated with emerging networks like UPN, WB, and PaxTV. Meanwhile, the competitive advantage already enjoyed by major network affiliates will be enhanced by widespread cable carriage. Coupled with the preferred position accorded digital cable networks by cable systems, many of ALTV's member stations will find themselves at a severe competitive disadvantage in their local video marketplaces. Thus, the stations with the least ability to finance the heavy cost of new digital facilities will be faced with the most difficult road to success as a local DTV station.

third cap (*i.e.*, less than one-third of 101).<sup>2</sup> Indeed, the cable industry's position, while hardly becoming, is revealing. Comments filed by cable television MSOs and networks roundly confirm that the cable industry wishes to place its self-interest first and do nothing it is not otherwise inclined to do to facilitate the transition from analog to digital television. Thus, cable interests uniformly have opposed DTV must carry rules in bold and uncompromising terms:

- They litter the record with a flurry of legal arguments which range from specious to fanciful to ludicrous.
- They chant incessantly a constitutional mantra that is out of tune with the Court's decision rejecting their constitutional objections to the analog must carry rules.
- They dispute the obvious unity of government interests served by both digital and analog must carry rules.
- They myopically discount the government interest in an expeditious transition from analog to digital television.
- They proffer another litany of overblown claims of no channel capacity, assuming, perhaps, that no one has noticed the cable industry's widespread construction of digital facilities.
- They posit a double must carry burden, but make no mention that twice *de minimis* is still *de minimis*.
- They exalt the diversity of cable networks, ignoring that they are neither free, universally available, nor as popular as even the more marginal local television stations.
- They boast of their service to the public, while the most visible manifestation of their service, C-SPAN, frets that cable operators will

---

<sup>2</sup>These reply comments are submitted by The Association of Local Television Stations, Inc. ("ALTV"). ALTV also has submitted comments in this proceeding. Comments of The Association of Local Television Stations, Inc., CS Docket No. 98-120 (filed October 13, 1998) [hereinafter cited as "ALTV Comments"]. ALTV has proposed the following must carry rules to govern cable carriage of local television stations' DTV signals during the transition: (1) Cable systems subject to the rules must carry the DTV signals of all local commercial television stations. (2) Any cable television system which transmits one or more digital signals would be subject to the rule immediately. Thus, for example, a cable system which carries a digital signal of a cable network would be subject to the DTV must carry rule. Similarly, any cable system which carried the digital signal of any broadcast television station (local or distant) would be subject to the DTV must carry rule. The rules would apply to all analog, digital, and hybrid digital cable systems, provided they transmitted any digital signal on their systems.(3) Large capacity analog cable systems which carried no digital channels also would be required at least to carry and pass through local television stations' DTV signals to their subscribers.



stampede to drop its network(s) if the Commission requires carriage of local DTV signals.

- They would leave consumers to buy and install new off-air antennas to replace the antennas graciously removed from their roof tops and set tops by local cable operators over the past several decades.
- They readily acknowledge their own economic incentives to engage in just the sort of selective carriage of local television stations which prompted adoption and judicial approval of the analog must carry rules.
- They show no interest in cooperating or playing a role the Commission considers essential to the true and ultimate success of free, broadcast television as a completely digital medium.

Thus, in the face of costly cooperative efforts involving the broadcast industry, the consumer electronics industry, the broadcast equipment industry, the Commission, and even the cable industry (when it was convenient), the cable industry now threatens to take its ball and go home if the Commission dares expect it to contribute to the success of DTV by carrying the DTV signals of not some, but all local television stations.<sup>3</sup>

ALTV also emphasizes that nothing yet submitted to the Commission in this proceeding even begins to obscure the eminently predictable result of failing to adopt DTV must carry rules: A significant number of local television stations' DTV signals will not be carried by cable systems in their local markets. Cable systems will carry the signals of local television stations affiliated with the major networks, using them as a draw for their own digital program services. Other stations, including many of ALTV's member stations, which have remained independent or have affiliated with emerging networks, will be denied access to as much as two-thirds of their potential audiences. The comments of several major cable MSOs and networks leave no real doubt about the outcome:

- Cable operators have powerful economic incentives to deliver digital programming in response to customer demand, and they surely will respond

---

<sup>3</sup>Incredibly, some cable companies all but threaten to shelve their own digital aspirations if the Commission dares implement DTV must carry rules. Comments of Time Warner Cable, CS Docket No. 98-120 (filed October 13, 1998) at 10 [hereinafter cited as "Time Warner Cable Comments"]; Comments of Discovery Communications, Inc., CS Docket No. 98-120 (filed October 13, 1998) at 8, 24 [hereinafter cited as "Discovery Comments"].

to those incentives *in an appropriate fashion*. Retransmission consent and private negotiation will be the vehicle by which the *overwhelming majority* of broadcasters will obtain cable carriage for their digital signals, as the Commission has recognized.<sup>4</sup>

- ...[M]arket forces alone will ensure that the DTV signals of many, if not most, broadcast television stations will be carried.<sup>5</sup>
- ...[T]he prediction that consumers' purchases of digital TV sets will stand or fall with a requirement that cable operators carry digital broadcast signals during the transition period assumes that cable operators would not carry digital signals without such a requirement. This assumption is clearly untenable. Even if cable operators were to carry no digital *broadcast* signals at all, the sale of digital TV sets might be driven by digital programming of cable programming services.<sup>6</sup>
- And certainly no one could argue that consumers will refrain from purchasing digital TV sets unless *every* local digital broadcast signal is carried on cable.<sup>7</sup>

One need read very little between the lines to understand what cable interests mean: leave us unencumbered to carry those stations which will help us attract subscribers -- and dump the rest.

---

<sup>4</sup>Discovery Comments at 31. Discovery does parrot reports that Paxson Communications "has had preliminary discussions with cable operators about carriage of his DTV stations." *Id.* at 37. Notably, Paxson has drawn insufficient solace from these discussions to prevent it from expressing staunch support for DTV must carry rules during the transition. Comments of Paxson Communications Corporation, CS Docket No. 98-120 (filed October 13, 1998) at [hereinafter cited as "Paxson Comments"].

<sup>5</sup>Comments of Ameritech New Media, CS Docket No. 98-120 (filed October 13, 1998) at 15 [hereinafter cited as "Ameritech Comments"]. Ameritech does suggest that cable systems would carry UPN, WB, and PaxTV affiliates. This view is not shared by Paxson Communications or the UPN affiliates, both of which favor adoption of DTV must carry rules during the transition. UPN Affiliates Comments, *supra*; Paxson Comments, *supra*. Furthermore, the recent CBS-Time Warner carriage deal only confirms that big established networks have the muscle to make carriage deals (albeit not-necessarily so good deals) to assure carriage of their DTV signals. See "CBS and Time Warner Reach DTV Carriage Deal," *Communications Daily* (December 9, 1998) at 1.

<sup>6</sup>Time Warner Cable Comments at 26.

<sup>7</sup>Time Warner Cable Comments at 7.

Those stations most vulnerable to cable's tendency to favor some stations, but not others, know that this is exactly what cable interests mean -- and exactly why the Commission must adopt DTV must carry rules applicable during the transition:

- The cable industry has made clear in its opposition to the imposition of DTV must-carry that it will not carry *all* of the DTV signals available in a market unless required to do so. That is particularly so with regard to affiliates of the new networks and independent television stations....[T]here is no economic incentive for cable systems to carry television stations other than the old established networks. Failure to carry the UPN stations would directly adversely affect them and would indirectly strengthen their network competitors.<sup>8</sup>
- The scores of UHF stations benefitting from must carry now form the basis for the new television networks such as WB, UPN, and PaxTV that are providing new competition and vitality to broadcast television, and, accordingly, the need for mandatory cable carriage is even more important than it was in 1992.<sup>9</sup>
- Pappas has typically acquired under-performing stations, or obtained authorizations from the Commission to build entirely new stations, commonly operating on UHF channels in smaller and mid-sized markets, and lacking an affiliation with the so-called "Big Three" national television networks...

\* \* \*

Retransmission consent is not practically available to many stations, including some of those owned by Pappas, that lack the leverage to bargain with their local cable operators for acceptable carriage terms.<sup>10</sup>

- An ironic twist to the proposal to use [retransmission consent] negotiations to obtain DTV carriage is that the only stations that will be able to do so are the ones that are less likely to have trouble obtaining DTV carriage: affiliates of the major national networks, on cable systems close to their city of

---

<sup>8</sup>Comments of Chris-Craft/United Group, CS Docket No. 98-120 (filed October 13, 1998) at 3 [hereinafter cited as "Chris-Craft Comments"].

<sup>9</sup>Paxson Comments at 10-11.

<sup>10</sup>Comments of Pappas Telecasting Incorporated, CS Docket No. 98-120 (filed October 13, 1998) at 2,4 [hereinafter cited as "Pappas Comments"].

license. This excludes many of the stations Congress was specifically concerned about in enacting must-carry: the small independent stations.<sup>11</sup>

- Without the requirement to carry all DTV commercial signals, cable operators would be free to drop smaller, local stations in favor of cable networks. If cable operators were permitted to cherry pick among DTV signals in this manner, small or independent stations, upon which the financial burden of the transition weighs most heavily, would have no assurance that their DTV signal will actually be received by a critical mass of viewers....The absence of a DTV must carry requirement inherently limits the size of the audience that will receive DTV broadcast signals. This limitation may well undermine the economic viability of numerous television stations and reduce their opportunities to fully and successfully compete in the digital environment.<sup>12</sup>

From ALTV's perspective, this is the heart of the matter. Some, perhaps, many, stations will be carried in the absence of DTV must carry rules during the transition, but a significant number will be denied carriage by many local cable systems. This will have a devastating impact not only on the stations and the non-cable subscribers in their markets, but also on the successful completion of a full transition to digital television. As observed the UPN affiliates:

UPN affiliates are concerned about the uncertainty surrounding the DTV must carry rules. As stations with smaller budgets than established network stations, the timing of the construction of digital facilities is critical, particularly in smaller television markets. It is unlikely that digital television, *per se*, will result in larger audiences or increased revenues for UPN affiliates. It is expected to be an unrewarded cost of doing business. The uncertainty of carriage on cable systems is likely to delay the implementation of DTV by such smaller stations.<sup>13</sup>

Thus, margined stations will remain on the margin or fail altogether; margined consumers will yet suffer inferior DTV service (*vis-a-vis* their cable subscriber neighbors) from a "rump

---

<sup>11</sup>Comments of the Arkansas Broadcasters Association, CS Docket No. 98-120 (filed October 13, 1998) at 8 [hereinafter cited as "Arkansas Broadcasters Comments"].

<sup>12</sup>Comments of Granite Broadcasting Corporation, CS Docket No. 98-120 (filed October 13, 1998) at 5 [hereinafter cited as "Granite Comments"].

<sup>13</sup>Comments of the Board of Governors of the UPN Affiliates Association, CS Docket No. 98-120 (filed October 13, 1998) at 4 [hereinafter cited as "UPN Affiliates Comments"].

broadcasting industry.”<sup>14</sup> ALTV, therefore, reiterates its call for immediate adoption of DTV must carry rules, applicable during the transition and beyond.

## **PART ONE: THE LITANY OF LAME EXCUSES**

---

### **Excuse Number One:**

#### **Section 614 Does Not Require DTV Must Carry Rules During the Transition Because Only Signals “Which Have Been Changed” Are Subject To Must Carry.**

ALTV and others have posited that the current must carry law embodied in Section 614 of the 1992 Cable Act, 47 U.S.C. § 534, mandates must carry for DTV as well as analog signals.<sup>15</sup> The cable industry on the other hand argues that Congress has granted the FCC no authority to adopt rules requiring carriage of local television stations’ DTV signals during the transition. Cable interests argue that Section 614 requires carriage of digital signals only after the transition, when local television stations cease to broadcast an analog signal. They seize on a phrase in Section 614(b)(4)(B) stating that carriage requirements are limited to signals “which have been changed” to conform to DTV transmission standards.<sup>16</sup>

---

<sup>14</sup>*Turner Broadcasting System, Inc. v. Federal Communications Commission*, 520 U.S. 180; 117 S. Ct. 1174; 137 L. Ed. 2d 369; 1997 U.S. LEXIS 2078 \*23 (1997) [hereinafter cited as *Turner II*].

<sup>15</sup>ALTV Comments at 7-13.

<sup>16</sup>Time Warner Cable Comments at 35 (“[T]he Commission has no authority to require digital must carry requirements as to broadcast signals which have not been changed to digital.”).

Their arguments are specious. First, they wrongly assume that section 614(b)(1)(B) has no application to digital signals. However, as already established in comments filed by ALTV and others, the basic must carry requirement extends to digital as well as analog signals. No other interpretation of the plain language of the statute makes sense.<sup>17</sup> Indeed, if cable interests are so willing to ignore the plain language of a statute, why have they not come forward to suggest that the cable compulsory license in Section 111 of the Copyright Act does not apply to local television stations' digital signals? Congress had no inkling of digital television in 1976, when it enacted the compulsory license. Nonetheless, its plain language -- "a broadcast station licensed by the Federal Communications Commission" -- arguably covers a DTV transmission from a licensed broadcast television station no less than an analog transmission from the station.<sup>18</sup> The same must be said for section 614(b)(1)(B). Therefore, seeking to determine the scope of the must carry rule within the narrow confines of section 614(b)(4)(B) is a faulty approach.

Second, the cable industry's interpretation leads to a nonsensical result -- something which may not be ascribed to Congress in construing a statute.<sup>19</sup> If must carry is limited to signals "which have been changed" to conform to DTV transmission standards, few local television stations' DTV signals ever would be entitled to must carry. To effectuate the transition, the FCC has assigned a second channel to every local television station from a table of DTV allotments. That second channel has been assigned only for DTV operation, based on interference standards which assume broadcast of a DTV signal on the channel. Every local station which elects to construct DTV facilities will commence their DTV operations on that assigned channel. Some have done so

---

<sup>17</sup>ALTV Comments at 7-13; Comments of the National Association of Broadcasters, CS Docket No. 98-120 (filed October 13, 1998) at 3-5 [hereinafter cited as "NAB Comments"].

<sup>18</sup>17 U.S.C. § 111(c).

<sup>19</sup>NCTA Comments at 15, *citing* *U.S. v. Turkette*, 452 U.S. 576, 580 (1981).

already. Meanwhile, they continue to broadcast their analog signal on their assigned analog channel in the FCC's analog table of allotments for the duration of the transition. At the close of the transition, most stations will continue to broadcast their DTV signal on their assigned DTV channel. Thus, their DTV signal never will change; it will have been a DTV signal conforming to digital broadcast transmission standards from the first electron pulsing out of the antenna through the transition and into the *post*-transition phase.<sup>20</sup> Neither will their analog signals change. They will discontinue broadcasting on their analog channels and return them; they will not *change* them to digital broadcast channels. Therefore, under the cable industry's hyper-literal embrace of section 614(b)(4)(B), such station's DTV signal would not be eligible for must carry because neither its analog nor digital signals ever will have changed.<sup>21</sup>

Furthermore, under cable's interpretation, only stations which return their DTV channel and *change* the signal on their current analog channel to conform to DTV broadcast transmission standards would be eligible for must carry. Consequently, some stations would enjoy must carry; others would not. Such a result makes no sense, as so rightly observed by A&E Television Networks, "If all eligible broadcasters are not carried... There is no coherent rationale for imposing must carry requirements."<sup>22</sup> Nothing in the statute or legislative history even hints that Congress

---

<sup>20</sup>As Time Warner Cable observes, "[T]ransitional DTV signals will begin broadcasting in the digital format at their inception -- they will not be "changed" from analog to digital, they will always have been digital." Time Warner Cable Comments at 33.

<sup>21</sup>As Time Warner Cable asserts:

Only those analog broadcast signals "which have been changed" to meet the Commission's modified standards for digital television conceivably could be the subject of any Commission rule requiring cable operators to carry such DTV signals.

Time Warner Cable Comments at 32-33.

<sup>22</sup>Comments of A&E Television Networks, CS Docket No. 98-120 (filed October 13, 1998) at 25 [hereinafter cited as "A&E Comments"].

contemplated such an arbitrary and senseless distinction between stations which elected to keep their DTV signals on their DTV channels and those which elected to switch their DTV signals to their analog channels.<sup>23</sup> Indeed, such an approach would be fundamentally inconsistent with Congress's determination to extend must carry protection to all local television stations.<sup>24</sup>

Second, cable interests point to a secondary definition of "change" in another vain attempt to invoke section 614(b)(4)(B) as an obstacle to the application of DTV must carry during the transition.<sup>25</sup> NCTA quotes in an elliptical fashion from the definition of "change" from the *Random House College Dictionary*, hinging its argument tenuously to the part of the definition which focuses on change as an "exchange" rather than a transformation.<sup>26</sup> Putting aside for the moment whether this definition of change is what Congress had in mind when it enacted section 614(b)(4)(B), NCTA's interpretation of the statute would lead to a ludicrous result. Again, many stations would stand to be denied eligibility for must carry. According to NCTA:

This change -- this "exchange for something else, usually of the same kind" will occur at the end of the transition. A broadcaster will exchange its spectrum granted for analog transmission for other spectrum. To impose must carry before the

---

<sup>23</sup>Those stations with analog channels outside the core channels would have no choice in the matter at all. They will have to maintain their DTV signals on their assigned DTV channels. Thus, they would be denied must carry by the very fact of their channel assignments in the Commission's table of allotments.

<sup>24</sup>*Turner II*, 1997 LEXIS 2078, \*23-24.

<sup>25</sup>See *Webster's New Collegiate Dictionary*, G. & C. Merriam Co., Springfield, MA (1959). ALTV notes respectfully that neither this edition of Webster (at 138), nor *The New Roget's Thesaurus in Dictionary Form*, G.P. Putnam's Sons, New York (1964), at 85, lists "exchange" or "substitute" as a synonym for the verb "change." Congress did use change as a verb, not as noun, in section 614(b)(4)(B).

<sup>26</sup>Comments of The National Cable Television Association, CS Docket No. 98-120 (filed October 13, 1998) at 10 [hereinafter cited as "NCTA Comments"].



“exchange” or “substitution” has occurred violates the plain meaning of the words Congress chose.<sup>27</sup>

This interpretation of the statute, therefore, is based on the erroneous notion that local television stations necessarily will exchange their analog channels for their digital channels at the end of the transition. However, many stations may elect to keep their analog channel rather than exchange it for their assigned DTV channel. These stations will switch their DTV operations to their analog channels. Under NCTA’s interpretation, because these stations did not exchange their analog channels for their digital channels, they would be ineligible for must carry. In like vein, these stations hardly could be said to have “substituted” their DTV channels for their analog channels, which remained their operating channels after the transition. Again, they would be denied must carry, while other stations which surrendered their analog channels, “exchanged” them for their assigned DTV channels or “substituted” their DTV channels for their analog channels, would be entitled to must carry. This result also is absurd and nonsensical and, as above, unworthy of attribution to Congress in crafting the statute.

Third, Time Warner misplaces its argument based on the “which have been changed” phrase in section 614(b)(40(B) on an ill-concealed shift in focus from signals to stations. Thus, after stating that only “those analog broadcast signals ‘which have been changed’” might be eligible for must carry, it segues into focusing on *stations* which have (or have not) changed:

Only those analog broadcast *signals* ‘which have been changed’ to meet the Commission’s modified standards for digital television conceivably could be the subject of any Commission rule requiring cable operators to carry such DTV signals. During the transition period, all pre-existing local commercial television stations will continue to broadcast analog signals. Such *stations* will not be changed to conform to the new DTV standards until the transition has been completed....Only upon the completion of the transition will any *stations* be changed from analog to digital, and only then can the Commission impose any DTV carriage obligations.<sup>28</sup>

---

<sup>27</sup>NCTA Comments at 11.

<sup>28</sup>Time Warner Cable Comments at 33 [*italics supplied*].

Such a semantic sleight of hand deserves a wink and a smile, perhaps, but no weight in the Commission's efforts to interpret the statute. The phrase "which have been changed" modifies "signals" in the context of the paragraph. It is signals, not stations, which are subject to "standards for television broadcast signals." Furthermore, if as Time Warner Cable states, "Only those analog broadcast signals 'which have been changed' to meet the Commission's modified standards for digital television conceivably could be the subject of any Commission rule requiring cable operators to carry such DTV signals," then, as noted above, the stations which elect to maintain their DTV operations on their assigned DTV channels would be denied must carry. Again, cable interests' efforts to transform section 614(b)(4)(B) into a limitation explode in a vapor of nonsense.

Fourth, cable interests' interpretations leave the Commission with the obligation to commence a proceeding *now* to adopt rules which would not apply until 2006! This, too, elevates the need for advance planning to the level of the absurd. Congress certainly expects the Commission to conduct its affairs with reasonable dispatch, but why commence a rule making some eight years in advance? Is the Commission meant to adopt the rule now or hold the proceeding open for seven years? In light of today's reply comment deadline, is one to assume that the Commission will mull them over for six years or that it will adopt a rule now with an effective date well into the next millennium? No rational basis exists for attributing such ridiculous notions to Congress.

Cable interests reliance on Section 614(b)(4)(B), thus, not only is misplaced, but also strained and ultimately nonsensical. They provide no statutory excuse for the Commission to defer DTV must carry until the transition is accomplished.

## **Excuse Number Two:**

### **Section 614(b)(5), Which Permits Cable Operators to Refuse Carriage of Stations with Programming Which Substantially Duplicates or Affiliated with the Same Network as Another Station Carried on the System, Defeats the Requirement That a Local Television Station's Analog and Digital Signals Be Carried.**

Cable interests pile on argument after argument based on various provisions of Section 614 which they argue evidence Congressional intent to forbear from or defer adoption of DTV must carry rules. These arguments ignore the basic statutory context and even standing alone fall far short of defeating the position that Congress intended that the FCC require carriage of local television stations' DTV signals *during*, as well as after the transition period. Cable interests make much of section 614(b)(5), which permits cable operators to refuse carriage of stations with programming which substantially duplicates or affiliated with the same network as another station carried on the system.<sup>29</sup> They note, in particular, that local television stations' DTV signals increasingly throughout the transition will duplicate the programming on the stations' analog signals. What they ignore in the process is the unambiguous language of section 614(b)(5), which limits its scope of the loophole to signals provided by *different television stations*. Cable systems might refuse carriage only with respect to "the signal of any local commercial station that substantially duplicates the signal of *another* local commercial television *station*" or "more than one local commercial television *station* affiliated with a particular broadcast network."<sup>30</sup> By its plain language, the section 614(b)(5) exception does not apply to two signals from the same station. Therefore, it hardly may be said to defeat a DTV must carry requirement or demonstrate any Congressional intent to deny DTV signals must carry status during the transition.

---

<sup>29</sup>*E.g.*, NCTA Comments at 12-13.

<sup>30</sup>47 U.S.C. §534(b)(5).

### Excuse Number Three:

#### **Section 614(b)(3)(A), Which Requires Carriage of the Primary Video of Local Television Stations, Negates the Requirement That Cable Systems Carry Both the Analog and DTV Signals of Local Commercial Television Stations.**

In yet another convulsive attempt to throw a log on the legal tracks toward implementation of DTV must carry rules, cable interests describe Section 614(b)(3)(A) as an impediment to adoption of DTV must carry rules.<sup>31</sup> Section 614(b)(3)(A) requires cable systems to carry, *inter alia*, the primary video and accompanying audio of local television stations. The fundamental premise of the cable interests' arguments is faulty. Time Warner, for example, scoffs that the "suggestion in the NPRM that there could possibly be more than one 'primary video' transmission stretches the bounds of semantics and credulity."<sup>32</sup> Time Warner goes on to proclaim that "By definition, no broadcast licensee can have more than one 'primary video' transmission."<sup>33</sup> No semantic basis exists for Time Warner's insistence that multiple primary transmissions are a definitional impossibility. One need only remember the number of *primary* colors -- not one, but three. Three primary video signals are no less impossible according to Webster than three primary colors.<sup>34</sup> Thus, contrary to Time Warner's contention that "'primary' has only a singular

---

<sup>31</sup>Time Warner Cable Comments at 48-49; Discovery Comments at 35; NCTA Comments at 14.

<sup>32</sup>Time Warner Cable Comments at 49, n.50.

<sup>33</sup>Time Warner Cable Comments at 49, n. 50. Many licensees, of course, have numerous "primary video" transmissions (*albeit* via different stations).

<sup>34</sup>*See Webster, supra*, at 680.

meaning,” primary may connote multiple primaries.<sup>35</sup> Without this essential foundation of the singularity of the concept of primary, cable interests’ arguments crumble completely. They may argue that a local television station’s analog signal should be considered primary and its DTV signal subordinate, but they then ignore that neither need be secondary if both may be primary.<sup>36</sup> They may argue that local television stations’ broadcast of analog and digital signals under one license as one station precludes a conclusion that multiple video signals may fall within the scope of “primary video,” but, again, they ignore that a single station may transmit multiple primary video signals.<sup>37</sup> Cable interests, therefore, may not raise section 614(b)(3)(A) as an obstacle to adoption of rules implementing must carry for DTV as well as analog signals.

**Excuse Number Four:**

**Section 614(B)(7), Which Requires That Signals Be Provided to Every Subscriber and Viewable on All Their Receivers, Bars Imposition of DTV Must Carry Requirements.**

Cable interests distort Section 614(b)(7) into yet another reason to let cable operators decide the fate of broadcast DTV signals -- and broadcast DTV as an invaluable service to consumers. First, NCTA would have the Commission read section 614(b)(7) to require cable operators to

---

<sup>35</sup>Time Warner Cable Comments at 49, n.50.

<sup>36</sup>Beyond expressing disdain for broadcasters’ entry into digital television, this position is no more than wishful thinking. Time Warner states that analog will remain primary until the station “surrenders its analog frequency and engages exclusively in DTV transmissions.” Time Warner Cable Comments at 49. The only basis for such an assertion is the supposition that “a broadcaster’s analog signal will continue to attract the majority of viewers during the transition period.” Time Warner Cable Comments at 49. What Time Warner’s premise really suggests then is that at some point in the transition a station’s DTV signal would become primary because the DTV signal would garner a larger audience. This logical extension of the cable interests’ arguments, however, runs headlong into cable interests’ arguments that DTV must carry is unauthorized during the transition.

<sup>37</sup>The language of the statute would have been more problematical had Congress stated that cable systems carry the primary video signal (singular) of a station, but Congress did not so limit the concept of primary video.

provide a set top box which downconverted a DTV signal to analog to assure that the DTV signal was viewable on all sets, including analog sets. Congress could not have meant this, says NCTA.<sup>38</sup> ALTV agrees. This provision reflected the concern that cable systems were not providing local signals to all sets, usually because the local station's signal was placed on a channel which could be received only with a converter box. Consequently, many consumers with multiple sets could view all local signals only on their main set, which alone was connected via a set top box. Other sets in the household often were connected directly to the cable with no box. In an era in which many sets were not "cable ready" (and on some cable systems, regardless), those second and third sets simply could not receive the channels on which some local stations were transmitted on the cable system. Congress, therefore, sought to assure that signals were available to all sets even if a converter box were required. However, once the signal was available at the output of the cable or cable set top box on a channel which the set could receive, then the problem was solved. In essence, the provision just assured that some stations were not excluded by virtue of the fact that the cable system provided them on channels (frequencies) outside the reception range of a set.<sup>39</sup> In the DTV environment, this section would require no more. Any DTV signal would have to be provided on a channel (frequency) within the reception range of the television receiver.<sup>40</sup> In other words, the cable system would be responsible as it is now in the case of analog signals to assure that the DTV signal of *every* local station reaches the input terminal of every set owned by a

---

<sup>38</sup>NCTA Comments at 15-16.

<sup>39</sup>For example, many cable systems employ the so-called mid-band channels to retransmit the signals of broadcast stations. These mid-band frequencies fall outside the range of frequencies tunable by a normal television receiver. Only cable-ready sets may tune in these channels in the absence of a set-top converter box.

<sup>40</sup>In the strict sense of the word, the signal would be viewable, although, perhaps, as snow. The point, however, is that the signal could be received.

consumer on a frequency within the tuning range of the set.<sup>41</sup> At that point (assuming no other tampering with or degradation of the signal), the cable operator's responsibility ends. Whatever happens once the signal is available and can be tuned in by the receiver, the cable operator has complied with the rule.

Time Warner similarly would force this strained, literal reading of section 614(b)(7) on the Commission to defeat the DTV must carry requirement.<sup>42</sup> Again, however, the fact that analog receivers will not be able to display a viewable picture from an unconverted DTV signal in no way suggests that a cable operator providing a DTV signal to consumers' sets on a broadcast channel tunable by the set has fallen short of compliance with the rule. What cannot happen with DTV signals any more than with analog signals under the rule is the functional exclusion of some stations due to the transmission frequency and system architecture employed by the cable operator.

Tying the rule to the extremely literal concept of viewability not only distorts the true purpose of the rule, but leads to much more ridiculous results. The cable system would bear responsibility for the operation of the consumer's receiver. If the consumer's set produced an unviewable picture due to an internal malfunction, then, according to NCTA's interpretation, the cable operator would have to come in and fix the set to assure the signal was viewable.<sup>43</sup> Therefore, section 614(b)(7) must be read with cognizance of the problem it was designed to

---

<sup>41</sup>As a practical matter, consumers are unlikely to insist on the availability of broadcast DTV signals unless the consumer has purchased or intends to purchase a DTV receiver or converter. Moreover, none of this should obscure that no consumer is likely to consider purchasing a DTV receiver or converter unless local stations' DTV signals will be available on his or her cable system when the DTV set is delivered and connected to the system.

<sup>42</sup>Time Warner Cable Comments at 47.

<sup>43</sup>Even NCTA, to its credit, imparts some sense of the strain inherent in its argument with phrasing such as, "the FCC...*might well*...compel cable operators to provide all subscribers a box so that a digital signal would be "viewable" on every analog set...." NCTA Comments at 15 [emphasis supplied].

solve, not in a manner which leads to a ridiculous result. Read properly, it fits in neatly with requiring carriage of DTV signals under section 614.

**Excuse Number Five:**

**The One-Third Cap on Channel Capacity Devoted to the Signals of Local Television Stations in Section 614(B)(1)(B) Undermines Operation of DTV Must Carry During the Transition.**

As if no portion of section 614 may be ignored in conjuring up reasons why section 614 would not accommodate DTV must carry requirements, cable interests also point to the one-third cap on channels to be devoted to carriage of local signals in section 614(b)(1)(B) as yet another impediment to DTV must carry. With notable irony, they suggest that a provision designed to assure that cable operators suffer no excessive burden under must carry rules might be applied in such way as to undermine effectiveness of the rule. Some argue that cable systems would carry the analog *and* digital signals of only the most popular stations.<sup>44</sup> Another stews that no room would be left for digital stations.<sup>45</sup> Yet another stews that no room would be left for analog stations.<sup>46</sup> Thus, they say, DTV must carry would engender perverse results.

Their concerns, however, are unjustified. First, the precise application of the one-third cap with respect to digital signals is unsettled. The Commission, for example, has raised the possibility of setting carriage priorities.<sup>47</sup> It also has sought comment on the definition of channel capacity, as

---

<sup>44</sup>NCTA Comments at 16.

<sup>45</sup>A&E Comments at 25, n.42.

<sup>46</sup>Time Warner Cable Comments at 23.

<sup>47</sup>Notice at ¶52.



well as separate capacity calculations for analog and digital signals.<sup>48</sup> Golden Orange Broadcasting has submitted a compelling argument that local television station signals carried pursuant to retransmission consent rather than must carry ought be excluded from signals counted towards the one-third cap.<sup>49</sup> The Commission's ultimate decisions on these and other related issues easily could alleviate the counterproductive results forecast by cable interests.

Second, cable interests' woeful predictions are based on alleged capacity shortfalls which are self-serving and myopic. For example, they assume that a cable system would be required to devote a full six MHz of bandwidth to every analog and digital signal carried.<sup>50</sup> In the digital age, this is a technical anachronism. With ever improving compression technology, cable systems will be able to furnish local television stations' analog signals on digital systems (or digital portions of analog systems) using much less than six MHz of bandwidth. Indeed, multiple converted analog signals may be converted to compressed, digital signals and transmitted in six MHz of bandwidth...something done today by DBS providers.<sup>51</sup> Thus, cable systems with digital capability will be able to transmit their analog broadcast stations (and cable networks) using much less than six MHz of bandwidth per channel. This will leave considerable capacity (even under the one-third cap) for transmission of high bit rate broadcast DTV (as well as other capacity hungry cable HDTV program services). Cable systems also may transmit at twice the bit rate of terrestrial

---

<sup>48</sup>*Notice* at ¶¶58-60.

<sup>49</sup>Comments of Golden Orange Broadcasting Company, Inc., CS Docket No. 98-120 (filed October 13, 1998) at 3-6 [hereinafter cited as "Golden Orange Comments"].

<sup>50</sup>*See, e.g.*, A&E Comments, Appendix III.

<sup>51</sup>*See, e.g.*, NAB Comments), Appendix D at 24; Comments of Zenith Electronics Corporation, CS Docket No. 98-120 (filed October 13, 1998) at 12 [hereinafter cited as "Zenith Comments"].

broadcast transmissions, again, expanding the carriage capacity of their systems within existing bandwidth.<sup>52</sup> In short, as Zenith concludes:

In the near term, however, digital video compression and robust modulation will provide sufficient channel capacity (bandwidth) for cable operators to carry both digital and analog terrestrially broadcasted programs.<sup>53</sup>

Therefore, cable interests' arguments that the one-third cap will eviscerate an analog/digital must carry requirement during the transition ignore reality. Section 614(b)(1)(B) may restrict carriage of must carry signals without materially diminishing the beneficial effects of the basic must carry requirement.<sup>54</sup>

**Excuse Number Six:**

**The Lack of Congressional Findings Relating to DTV Must Carry Indicates That Congress Never Intended that the Commission Adopt DTV Must Carry Rules.**

Cable interests err in contending that the lack of specific findings about DTV indicates that Congress never intended to enact DTV must carry requirements. First, the bulk of the findings advanced in support of the must carry law apply equally to digital and analog signals.<sup>55</sup> It makes little difference whether a station is providing a digital signal or an analog signal or both. Signals not carried are unavailable to over 60 per cent of the television audience whether they are analog or

---

<sup>52</sup>Zenith Comments at 12.

<sup>53</sup>Zenith Comments at 12. The above discussion of cable channel capacity barely scratches the surface. The record includes substantial evidence that digitally-capable and other high capacity cable systems will have no difficulty accommodating the increased carriage demands of the DTV must carry obligation. *See, e.g.*, NAB Comments at 25-35.

<sup>54</sup>Indeed, as observed by New World Paradigm, channel addressing ultimately may eliminate capacity constraints as they are known today. Comments of New World Paradigm, Ltd. , CS Docket No. 98-120 (filed October 13, 1998).[hereinafter cited as "New World Paradigm Comments"].

<sup>55</sup>*See* ALTV Comments at 23 *et seq.*

digital.<sup>56</sup> Congress, therefore, made no distinction between analog and digital signals transmitted by local television stations, except to direct the FCC to modify the must carry rules adopted pursuant to section 614 to ensure that digital signals were carried once the technical standards for

---

<sup>56</sup>The following excerpts from the Congressional findings in the 1992 Cable Act are illustrative:

(3) ...[T]he cable television industry has become a dominant nationwide video medium.

(9)...[C]arriage of [local commercial television stations] is necessary to serve the goals contained in section 307(b) of the Communications Act of 1934 of providing a fair, efficient, and equitable distribution of broadcast services.

(12) Broadcast television programming is supported by revenues generated from advertising broadcast over stations. Such programming is otherwise free to those who own television sets and do not require cable transmission to receive broadcast signals. There is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming.

(13) As a result of the growth of cable television, there has been a marked shift in market share from broadcast television to cable television services.

(14) Cable television systems and broadcast television stations increasingly compete for television advertising revenues. As the proportion of households subscribing to cable television increases, proportionately more advertising revenues will be reallocated from broadcast to cable television systems.

(15) A cable television system which carries the signal of a local television broadcaster is assisting the broadcaster to increase its viewership, and thereby attract additional advertising revenues that otherwise might be earned by the cable system operator. As a result, there is an economic incentive for cable systems to terminate the retransmission of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position. There is a substantial likelihood that absent the reimposition of such a requirement, additional local broadcast signals will be deleted, repositioned, or not carried.

(16) As a result of the economic incentive that cable systems have to delete, reposition, or not carry local broadcast signals, coupled with the absence of a requirement that such systems carry local broadcast signals, the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized.

(17) ....Most subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services....

(18) Cable television systems often are the single most efficient distribution system for television programming. A Government mandate for a substantial societal investment in alternative distribution systems for cable subscribers, such as the "A/B" input selector antenna system, is not an enduring or feasible method of distribution and is not in the public interest.

DTV transmissions were adopted by the Commission.<sup>57</sup> This is a far cry from making no findings pertinent to carriage of DTV signals.

Second, the absence of express findings about DTV means nothing. DTV broadcasting did not exist at the time. This hardly detracts, however, from the applicability of “generic” findings about the significance of broadcasting to the public (and those without cable, in particular), the monopoly position of local cable systems, the competitive incentive of cable systems to refuse to carry local television station signals, or the effect on the stations refused carriage. Therefore, statements like that of A&E that “the interests underlying possible carriage requirements for digital broadcast signals have not been well articulated, nor have they been adopted by Congress,” have no merit whatsoever.<sup>58</sup>

Third, and most revealing, Congress never made any finding that would support deferring DTV must carry until the transition is complete. Nothing in the findings supports the contention that Congress intended to leave DTV at the mercy of cable operators, especially in light of their monopoly power, historical reticence and ongoing incentives to deny carriage to many local television stations, and the devastating effect of noncarriage on those stations.

Therefore, contrary to the assertions of cable interests, Congressional findings in the 1992 Cable Act only buttress the applicability of the must carry requirement to local television stations’ DTV signals.

---

<sup>57</sup>See ALTV Comments at 8.

<sup>58</sup>A&E Comments at 15.

**Excuse Number Seven:**

**Section 309(j) of the 1997 Balanced Budget Act Invalidates the Conclusion that Section 614 Requires Carriage of Local Television Stations' DTV as Well as Analog Signals.**

Cable interests next cite Section 309(j) of the 1997 Balanced Budget Act as confirming that Congress granted the FCC no authority to adopt DTV must carry rules, but, again, their position is unsound. As Time Warner states, nothing in the text of the 1997 Balanced Budget Act "even addresses the Commission's jurisdiction over digital must carry during the transition."<sup>59</sup> Having said that, cable interests resort to implications and legislative history, but neither is availing of their position. First, Time Warner wrongfully relies on the conference report, which states (in a less selective fashion than Time Warner's reference):

The conferees emphasize that, with regard to the inquiry required by section 309(j)(14)(B)(iii)(I) into MVPD carriage of local digital television service programming, Congress is not attempting to define the scope of any MVPD's "must carry" obligations for digital television signals. The conferees recognize that the Commission has not yet addressed the "must carry" obligations with respect to digital television service signals, and the conferees are leaving that decision for the Commission to make at some point in the future.<sup>60</sup>

According to Time Warner, this provision indicates that:

Congress assiduously avoided any deviation from its strict instructions to the Commission in the 1992 Cable Act not to consider imposing digital must-carry on cable systems until the transition from analog to digital has been completed.<sup>61</sup>

ALTV respectfully submits that the quoted language (including the introductory clause omitted by Time Warner) indicates no more than it says: Section 309(j) does not indicate a Congressional

---

<sup>59</sup>Time Warner Cable Comments at 42.

<sup>60</sup>H.R. Conf. Rep. No. 109, 105th. Cong., 1st. Sess. 6175 (1997)[hereinafter cited as "1997 Conf. Rep."].

<sup>61</sup>Time Warner Cable Comments at 43.

judgment about the *scope* of DTV must carry, which it already had left to the FCC. This language, thus, assumes that DTV must carry rules will be adopted by the Commission. However, it says nothing about *when* those should be adopted or *what* their precise scope might be.<sup>62</sup>

Second, both NCTA and Time Warner erroneously embrace Section 309(j) as implying that a DTV must carry requirement during the transition would be contrary to Congressional intent. Time Warner contends that Congress could not have contemplated DTV must carry during the transition because it inserted the modifying clause “that carries one of the the digital television service programming channels of each of the television stations broadcasting such a channel in such market.”<sup>63</sup> In a must carry environment, Time Warner asserts, this clause would have been unnecessary, because affected cable systems already would be carrying local television stations’ DTV signals. Time Warner’s interpretation makes sense only if it might rewrite the statute to fit its argument. Section 309(j)(14)(B)(iii)(I) does not, as Time Warner suggests, refer only to cable systems.<sup>64</sup> It refers to “a multichannel video programming distributor.”<sup>65</sup> A cable system certainly is a multichannel video programming distributor, but not the *only* type of multichannel video programming distributor. Therefore, even if cable systems were subject to DTV must carry requirements during the transition, the modifying clause is essential to limit the provision’s application to only those other multichannel video providers (not subject to must carry) which carry local stations’ DTV signals. Time Warner’s argument, consequently, is fundamentally unsound.

---

<sup>62</sup>NCTA points out that the 1997 Balanced Budget Act gave Congress the opportunity (upon which Congress failed to seize) to clarify the application of Section 614 to DTV during the transition. NCTA Comments at 19.

<sup>63</sup>Time Warner Cable Comments at 44, *citing* Section 309(j)(14)(B)(iii)(I) of the Balanced Budget Act of 1997.

<sup>64</sup>Time Warner Cable Comments at 44.

<sup>65</sup>47 U.S.C. §309(j)(14)(B)(iii)(I).

Time Warner also argues in a flawed fashion that because the conditions in both paragraphs (a) and (b) of subsection (II) must be satisfied to close out the transition, Congress envisioned a world without DTV must carry during the transition.<sup>66</sup> ALTV respectfully suggests that paragraphs (a) and (b) are connected by an “or” not an “and.” Thus, both need not be satisfied. Therefore, ALTV assumes that Time Warner really meant to refer to subsections (I) and (II), which, notably, do suffer the conjunction “and” between them. Thus, in order for the transition to continue beyond 2006, at least 15 per cent of the television households in a market must remain unable to receive DTV because they do not subscribe to an MVPD that carries local stations’ DTV signals *and* do not have a DTV receiver *or* converter. Time Warner posits that Congress “‘recognized that the successful transition of broadcast television from analog to DTV can be measured by the ability of viewers to receive DTV broadcasts off-the-air, without any assistance from cable systems.’”<sup>67</sup> What Time Warner fails to comprehend is that a Congress contemplating the existence of DTV must carry for cable during the transition would have written this provision in exactly the same way! Time Warner’s argument, therefore, proves nothing.

Lastly, Time Warner makes a similar argument based on the notion that a market will be *post*-transition in 2006 even if at least of 85 per cent of the television households have DTV converters and no cable service.<sup>68</sup> Again, however, this proves nothing. Congress had to allow for availability of DTV signals via both MVPDs and off-air reception. However, it said and meant nothing in Section 309(j)(14)(B)(iii) about DTV must carry one way or the other.

---

<sup>66</sup>Time Warner Cable Comments at 45.

<sup>67</sup>Time Warner Cable Comments at 45.

<sup>68</sup>Time Warner Cable Comments at 45-46.

NCTA's point is no more availing. NCTA calls Section 309(j)(14)(B)(iii) not an accelerator, but brakes on the transition, thereby undermining the conclusion that Congress had espoused a government interest in expediting the transition.<sup>69</sup> This ignores that Congress set a deadline on the transition. The "safety valve" in Section 309(j)(14)(B)(iii) in no way detracts from Congress's primary goal of fostering rapid development and return of analog spectrum for auction. NCTA essentially is saying that the existence of a safety valve on a steam locomotive indicates that the railroad has no interest in running its trains on time.

When all is said and done, Section 309(j)(14)(B)(iii) is a giant zero *vis-a-vis* cable interests' arguments that it reveals the intent of a Congress five years prior to defer DTV must carry to the close of the transition.

#### **Excuse Number Eight**

##### **The Legislative History of the 1992 Cable Act Indicates That Congress Never Intended DTV Must Carry Rules to Apply During the Transition.**

Cable interests simply sidestep the plain statutory language of Section 614 and, again, seize upon the repetition of the "which have been changed" language in a futile attempt to impose their gloss on Congressional intent. Again, they point to the same language in the legislative history referring to signals "which have been changed" to establish supposed Congressional intent that DTV must carry must await the end of the transition.<sup>70</sup> Again, their interpretation is severely flawed, leading to the same unacceptably absurd consequences as their argument based on the statutory language itself.<sup>71</sup> Again, whereas they remonstrate that "not a shred of evidence

---

<sup>69</sup>NCTA Comments at 20.

<sup>70</sup>Time Warner Cable Comments at 34.

<sup>71</sup>See Excuse Number One, *supra*.



illustrating a Congressional intent to impose simultaneous DTV and analog must-carry regime can be found in the legislative history,” they ignore the plain language of section 614 that requires carriage of “the signals of local commercial television stations” without regard for whether the signal is digital or analog.<sup>72</sup> Thus, their arguments, again, advance their case not a millimeter (silly or otherwise).

**Excuse Number Nine:**

**The Legislative History of the 1996 Telecommunications Act Confirms Congressional Intent that the 1992 Cable Act Provided No Must Carry Requirement for DTV During the Transition.**

Cable interests launch a triple thrust attack on DTV must carry based on the 1996 Telecommunications Act. First, they argue that Congress knew about DTV in 1996, but said nothing.<sup>73</sup> So... Why would Congress say anything then about a law enacted four years and two Congress’s previously? The courts would pay little heed to such pronouncements in the legislative history of subsequent laws.<sup>74</sup> Moreover, why should Congress have to interpret and reinterpret what is plain and unambiguous in the 1992 Cable Act?

Second, they err in relying on Section 336 of the 1996 Act, which denies the Commission authority to adopt must carry requirements for ancillary and supplementary DTV services.<sup>75</sup> This

---

<sup>72</sup>See Excuse Number One, *supra*.

<sup>73</sup>E.g., Time Warner Cable Comments at 41.

<sup>74</sup>*United States v. Southwestern Cable Company*, 392 U.S. 157, 170 (1968) [hereinafter cited as *Southwestern Cable*] (“[T]he views of one Congress as to the construction of a statute adopted many years before by another Congress have ‘very little, if any, significance.’”).

<sup>75</sup>E.g., Time Warner Cable Comments at 42.

provision obviously has nothing to do with must carry for free, broadcast DTV services transmitted in local television stations' DTV signals.

Third, they emphasize legislative history which says, indeed, that Section 336(b)(3) does not confer must carry on DTV.<sup>76</sup> No-duh! Why would Congress impose DTV must carry *again* when it already had done so in the 1992 Cable Act? Therefore, cable interests fail to offer anything remotely probative of Congressional intent with respect to Section 614 and the 1992 Cable Act with their empty rhetoric based on the 1996 Telecommunications Act.

**Excuse Number 10:**

**The Legislative History of the 1997 Balanced Budget Act Confirms Congressional Intent that the 1992 Cable Act Provided No Must Carry Requirement for DTV During the Transition.**

In yet another effort to conjure a credible argument from thin air, cable interests turn without success to the legislative history of the 1997 Balanced Budget Act. They cite the following language:

The conferees emphasize that, with regard to the inquiry required by section 309(j)(14)(B)(iii)(I) into MVPD carriage of local digital television service programming, Congress is not attempting to define the scope of any MVPD's "must carry" obligations for digital television signals. The conferees recognize that the Commission has not yet addressed the "must carry" obligations with respect to

---

<sup>76</sup>Discovery puts a new slant on this argument by rewriting the language to support its argument. Discovery quotes the pertinent portion of the Conference Report as follows:

[T]he conferees do not intend [section 614(b)(4)(B)] to confer must carry status on advanced television or other video services offered on designated frequencies...

Discovery Comments at 33, *citing* "H. REP. NO. 104-458, at 161 (1996)". Contrast this rendition of the report with Time Warner's, which correctly cited the conference report, as follows:

[W]ith respect to paragraph (b)(3), the conferees do not intend this paragraph to confer must carry status on advanced television or other video services offered on designated frequencies...

<sup>76</sup>Time Warner Comments at 42, *citing* "H.R. Conf. Rep. No. 458, 104th. Cong., 2d sess. 161 (1996)." Discovery also leaves a strong implication that this language is part of the legislative history of Section 614(b)(4)(B), which, of course, it is not.

digital television service signals, and the conferees are leaving that decision for the Commission to make at some point in the future.

Time Warner characterizes this language as a reiteration that the Commission must adhere to Section 614(b)(4)(B).<sup>77</sup> ALTV is inclined to agree.<sup>78</sup> Where ALTV and Time Warner differ is on the meaning of section 614. What is abundantly clear is that Congress “simply affirmed that Section 309 had nothing to do with the must carry requirements and acknowledged the obvious, namely, that the Commission had yet to deal with the matter, but would do so in the future.”<sup>79</sup> Section 309’s legislative history, therefore, in no way undercuts section 614 or suggests that it did not contemplate DTV must carry requirements during the transition.

**Excuse Number 11:**

**The Telecommunications Act of 1996 Provides the Commission with No Authority to Adopt DTV Requirements During the Transition.**

Cable interests assert mistakenly that the lack of Congressional action changing section 614 in the 1996 Telecommunications Act leaves the Commission without authority to adopt DTV must carry rules during the transition.<sup>80</sup> The linchpin of the argument is that in 1996 “Congress did nothing in a landmark revision of the Communications Act to change its earlier pronouncements on this issue.”<sup>81</sup> Therefore, they assert, because 614(b)(4)(B) was enacted to “ensure that any free, over-the-air broadcasts by DTV transition signals were not entitled to mandatory carriage,” the

---

<sup>77</sup>Time Warner Cable Comments at 43.

<sup>78</sup>Indeed, Section 614(B)(4)(b) makes sense only in a context in which the basic must carry obligation is established -- as it is in this case by Section 614(b)(1)(B).

<sup>79</sup>ALTV Comments at 11.

<sup>80</sup>Time Warner Cable Comments at 41.

<sup>81</sup>Time Warner Cable Comments at 41.

1996 Act is significant only in that it made no change in the 1992 Act.<sup>82</sup> ALTV concurs that the 1996 Act made no change in section 614. Cable interests' argument, turns, therefore, on their premise that section 614 created no DTV must carry obligation during the transition. However, inasmuch as Congress unambiguously intended that DTV as well as analog signals be subject to must carry requirements under section 614, cable interests' argument has no merit.

**Excuse Number 12:**

**Section 614 May Not Be Construed to Require DTV Must Carry Requirements During the Transition Because, Thus Construed, It Would Be Unconstitutional.**

In a last gasp effort to assign the unambiguous meaning of section 614 to oblivion, cable interests argue that section 614 must be read to exclude a DTV must carry requirement during the transition in order to avoid constitutional concerns.<sup>83</sup> Again, such an argument draws validity only from the premise of unconstitutionality upon which it rests. According to NCTA, "reading the statute to double cable operators' and programmers' must carry burdens during the multiyear transition to digital television presents a 'serious likelihood that the statute would be held unconstitutional.'"<sup>84</sup> ALTV respectfully submits that section 614 is amenable to a construction which imposes no undue burden on cable operators and programmers and has offered a proposal which takes appropriate cognizance of cable operators' concerns about channel capacity and usage.<sup>85</sup> Furthermore, as set forth below, cable interests' arguments concerning the

---

<sup>82</sup>Time Warner Cable Comments at 42.

<sup>83</sup>NCTA Comments at 20-21.

<sup>84</sup>NCTA Comments at 21.

<sup>85</sup>ALTV Comments at 22.

constitutionality of transitional DTV must carry requirements are far from compelling. Indeed, interpreted so as to require appropriate DTV must carry rules during the transition, section 614 is no more an infringement of First Amendment rights than it has been with respect to analog must carry.<sup>86</sup>

**Excuse Number 13:**

**Section 624(f) of the Communications Act Bars Any DTV Must Carry Requirement Other Than Those Mandated in Title VI.**

Cable interests contend pointlessly that section 624(f) of the 1992 Act precludes the Commission from adopting any DTV must carry requirement beyond that authorized in section 614.<sup>87</sup> This argument is immaterial. Again, it would contribute to the debate only if one agrees with Time Warner that “Section 614(b)(4)(B) is the only source of the Commission’s authority to impose any such obligations, and it plainly says that cable systems can be required to carry only commercial broadcast stations ‘which have been changed’ from analog to digital.”<sup>88</sup> As shown above (and in numerous comments filed in this proceeding), however, Section 614, which is in Title VI, is not so limited. To the contrary, it applies to DTV and analog signals.<sup>89</sup> Therefore, the Commission need look no further than section 614 for authority to adopt DTV must carry rules applicable during the transition. Cable interests’ argument based on Section 624(f), consequently, has no relevance or materiality in this proceeding.

---

<sup>86</sup>ALTV Comments at 13.

<sup>87</sup>NCTA Comments at 20; Time Warner Cable Comments at 39.

<sup>88</sup>Time Warner Cable Comments at 39.

<sup>89</sup>*See, e.g.*, ALTV Comments at 7-13.